

NZ Certificate in Real Estate (Salesperson) (Level 4)

MODULE 2 – UNIT STANDARD 23136 (V6)

**Demonstrate knowledge of consumer.
protection law related to real estate.
(Level 4, Credits 4)**

Learner Guide



Word cloud terms: Fair, Consumer, Unsubstantiated, Deceptive, of, Uninvited, Misrepresentation, Practices, Disclosure, Sales, Direct, Trading, Law, Code, REA, and, Contract, Protection, Unfair, The, Commercial, Act, Conduct, Misleading.

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Contents

Introduction	4
Consumer protection and disclosure	4
Clients and customers	4
Disclosure	4
The Fair-Trading Act 1986	
The overall principle of the Fair-Trading Act	5
Parties 'in trade'	6
The Fair-Trading Act - Misleading and deceptive conduct and Misrepresentation	6
The Fair-Trading Act – Section 9	
Other examples of misleading and deceptive conduct	8
Liability under Section 9	8
The Fair-Trading Act – Section 14	
False representations and other misleading conduct in relation to land (FTA)	10
Section 14(1)(a) and 14(1)(b)	11
Section 14(2)	13
The Fair-Trading Act – Section 12A - Unsubstantiated representations (FTA)	15
The Fair-Trading Act – Section 17- Unfair practices	16
The Fair-Trading Act - Unfair contract terms Section 26A and 46A	17
The Fair-Trading Act - Uninvited direct sales	18
Impact on real estate agencies/licenseses	21
Possible Penalties	
Section 40 - breaches of the Fair-Trading Act	21
Commerce Commission penalties under the Fair-Trading Act	22
Real Estate Authority (REA) penalties and Risk Management	23
The Contract and Commercial Law Act 2017	
Section 35 - Damages for misrepresentation under	24
Section 37 - Contract cancellation under section	25
Legal concepts associated with misrepresentation	26
The impact on real estate licensees, clients, and customers	27
The Code of Conduct and key rules relating to a Licensees obligation:	
Disclosure, avoiding misleading conduct, false information and withholding information	28
The fiduciary relationship	29
Duty of Care to the Client and Customer	30
Rules reflecting the principles of consumer protection law	30
Licensee obligations in relation to Rule 10.7 and Disclosure	31
Licensees must not be misleading in terms of price expectations	32
Disclosure must be in writing	33
Disclosure of confidential client information in other circumstances	34
Case Studies	35

Introduction

Sections from two important consumer protection laws will be covered in this study guide.

These protection laws are as follows:

- The Fair-Trading Act 1986.
- The Contract and Commercial Law Act 2017.

Rules from the Code of Professional Conduct and Client Care (Code of Conduct) are also designed as a means of consumer protection. The rules that relate to a licensee's disclosure obligations and requirement to avoid misleading conduct or giving false information and not withholding information will be discussed too.

Consumer protection and disclosure

To meet the requirements of consumer protection law and the Code of Conduct, it is important that licensees uphold their disclosure obligations to both clients and customers.

Disclosure is the act of disclosing (giving) information to parties involved in a transaction.

Disclosure of information must meet legislative requirements.

Another particularly important consideration is how to balance licensee disclosure obligations in the relationship with clients and customers.

Clients and customers

The **client** is the party who has an **agency agreement** with the **real estate agent**. The client is most often a seller or lessor who is offering a property or business for sale, or a space for lease. The customer, in that case, would be the buyer or lessee.

In other situations, a buyer or lessee might ask an agency to work on their behalf to secure a property, space, or business. In that case, an agency agreement would be signed between the agency and the buyer or lessee. The buyer or lessee would be client. The customer, in that situation, would be the seller or lessor.

When to disclose

When you are working on a real estate transaction on behalf of a client seller/lessor, there are four specific points in the process when it is particularly important to have accurate information and to disclose that information to potential customers about the property, space, or business you are marketing.

The key points of the transaction are as follows:

- At the time of advertising and marketing.
- At the time of inducement (when the prospective buyer or lessee is given information that influences their decision to make an offer).
- At the time of contract (when the sale and purchase or lease agreement is signed).
- In the time between contract and settlement.

The Fair-Trading Act 1986

The main purpose and overall principle of the Fair-Trading Act 1986 is to protect consumers. It applies across all industry sectors (whether you are working in a residential, commercial, business broking or rural real estate role).

Rule 6.4 & 10.7 builds on the principles expressed in **Section 9 and Section 14** of the Fair- Trading Act.

The Ministry of Consumer Affairs says that:

“The Fair-Trading Act prohibits misleading and deceptive conduct, false representations and unfair practices by people in trade.” These sections specifically relate to real estate.

Section 9

Misleading and deceptive conduct

Section 14

False representations and other misleading conduct in relation to land.

Section 12 A

Unsubstantiated representations

Section 17

Offering gifts and prizes (unfair practices).

Section 26A

Unfair contract terms in standard form consumer contracts.

Section 36K TO 36S

Uninvited direct sales.

Section 40

Penalties for an offence

The Commerce Commission enforces the Fair-Trading Act. Civil action may also be taken through the courts for breaches of section 9.

For more information, visit: <https://comcom.govt.nz/consumers/your-rights-as-a-consumer> .

Fair Trading Act 1986

1A Purpose

1. The purpose of this Act is to contribute to a trading environment in which—
 - a. the interests of consumers are protected; and
 - b. businesses compete effectively; and
 - c. consumers and businesses participate confidently.
2. To this end, the Act—
 - a. prohibits certain unfair conduct and practices in relation to trade; and
 - b. promotes fair conduct and practices in relation to trade; and
 - c. provides for the disclosure of consumer information relating to the supply of goods and services; and
 - d. promotes safety in respect of goods and services.

People in Trade

The provisions of the Fair-Trading Act 1986 grant certain protection to the consumer. It deals with the issue of misleading and deceptive conduct and applies to anyone 'in trade'.

The word 'trade' is defined in **Section 2** of the Act as meaning 'any trade, business, industry, profession, occupation, activity of commerce or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land'.

- Conduct by a private individual, outside their occupational business, is not considered to be 'in trade'.
- Licensed real estate practitioners are 'in trade' and their conduct, therefore, is required to comply with the Fair-Trading Act.

Two key sections of this Act that apply are:

Section 9 - prohibits conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 14 - in relation to land - prohibits false or misleading representation.

is a specific section concerning false representations and other misleading conduct in relation to the sale or possible sale or promotion for sale of an interest in land and also apply to real estate work.

The Fair-Trading Act 1986 Link - <http://www.legislation.govt.nz/act/public/1986/0121/61.0/DLM96439.html>

NOTE: False Representations and Other Misleading Conduct

The legislation talks about 'land'. This also includes any buildings and interests in land, e.g., leases or equitable interests.

- 'Promotion by any means' covers all activities and communications that may impact upon a property sale or possible property sale.
- Showing the property [open homes, individual viewings]
- Telephone / face to face discussions with customers and prospective customers
- Emails and other correspondence
- Advertising, signs, fliers, electronic marketing material
- Discussions with colleagues
- Sales negotiations
- Social functions [e.g., promotional seminars]
- Any other activities that impact on promotion

Fair-Trading Act 1986

Fair Trading Act 1986

Part 1 Unfair conduct

Misleading and deceptive conduct

9 Misleading and deceptive conduct generally

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 9 means that no person 'in trade' can engage in misleading or deceptive conduct or conduct that is likely to mislead or deceive. It does not matter whether you **intend** to mislead or not, only that your conduct is **likely** to mislead.

A client or purchaser who considers they have suffered loss or damage as a result of misleading or deceptive conduct by a licensee may sue (in the civil jurisdiction) the Agent and/or Salesperson involved.

The term **misleading and deceptive** means to give the wrong idea or impression about something.

In the Fair-Trading Act, under section 2(2), **engaging in conduct** includes (a) **omitting** to do an act; or (b) making it known that an act **will** or, as the case may be, **will not** be done. This also includes physical actions such as nodding and pointing.

- Misleading and deceptive conduct relates to what you do or say and what you do not do or do not say to give a wrong idea or impression. This results from not properly disclosing information. This includes what you say (or do not say) verbally to consumers, and written information given (or not given) in correspondence, advertising, and marketing material. What you do say is more often a breach of section 14(1).
- If a client or customer thinks they have been misled or deceived by a licensee during the purchase/lease process, or that their contract was misleading or deceptive, it is generally the agent/licensee that would be liable under the Fair-Trading Act.
- Under section 9, it does not matter whether or not the licensee intends to mislead. The only thing that matters is that the licensee's conduct is likely to mislead.
- Licensees have faced claims under section 9 even when they said they did not know they were giving incorrect information.

Here are some examples of misleading and deceptive conduct as they relate to real estate:

- A licensee knows, or should know, about something that is not compliant about a property being marketed. For example, a seller client had done some work on the property without a building consent, but consent was required for the type of work carried out. This issue was not mentioned to prospective customers.
- A potential buyer is taken to view a property and wants to make some improvements if they buy the property, for example, they talk about wanting to build an extension. The licensee allows that potential buyer to believe that the property has potential for development without checking if the work would be allowed.
- A licensee is marketing a property that is not structurally sound. The licensee tells prospective buyers that there are no problems with the property and does not recommend they seek independent legal and/or technical or other expert advice.
- A licensee provides incorrect information to a potential buyer about zoning: for example, that a property could be used for business purposes when it is zoned for residential use.
- A licensee puts out a flyer that gives the impression that she has personally sold a large number of properties in a suburb, making her the local expert. Some of the sales were made by other agencies.
- A licensee gives incorrect information about the area of land belonging to a property, e.g., stating that a property has larger land than it actually has.
- A licensee gives incorrect information about the zoning or use of a property, e.g., that it has commercial potential due to business zoning when in fact it has residential zoning.
- A licensee leads a customer to believe that a property has the potential to be sub-divided or will get planning permission for an extension without checking that this is truly the case.
- A licensee gives assures a customer that a property is structurally sound, when it is not, and failing to encourage them to seek independent advice.
- A licensee remains silent to a customer about a property defect that you know about, or should know about, e.g., where you know that renovation work was done to the property without a building consent when one should have been applied.

The Fair-Trading Act 1986 - Civil liability

A breach of section 9 is excluded from the fines under section 40 because it is not a 'criminal offence', but it still has consequences.

Section 9 enacts a prohibition on engaging in misleading or deceptive conduct "in trade". Section 43 begins to operate only when a breach of section 9 (or some other provision of the Act) has been proved. It enables a court to provide a remedy for any existing or future consequence of the breach, where someone has suffered or is likely to suffer loss or damage.'

Section 9 of the Fair-Trading Act prohibits any person in trade engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. A client or purchaser who considers they have suffered loss or damage as a result of misleading or deceptive conduct by a licensee may sue (in the civil jurisdiction) the Agent and/or Salesperson involved.

Real estate agents owe contractual and tortious duties to their clients to exercise the care expected of a competent and careful agent in the performance of their duties. Agents owe a fiduciary duty to their clients.

A fiduciary duty includes the duty not to allow the interests of a third party to conflict with the interests of the party on whose behalf the agent is acting (the client or vendor). An agent must not put themselves in a position or enter into a transaction in which the agent's personal interest, or duty to another person, may conflict with his or her duty to their client, unless the client has full knowledge of all the material circumstances and the nature and extent of the agent's interests and consents to the agent acting for them. Consent should be obtained in writing, together with a summary of the conflict of interest as it has been described to the client.

In a high-profile legal case in 2009, an agent was been found in breach of **Section 9** of the Fair-Trading Act by failing to disclose the nature and extent of their association with a purchaser. The agent had acted on behalf of the purchaser on a number of occasions and had knowledge of the purchasers' way of operating in property speculation.

Use this link to read about the case.

<https://www.courtsofnz.govt.nz/assets/cases/2009/sc-23-2008-mStevens-and-Ors-v-Premium-Real-Estate-Ltd-civil-appeal.pdf>

The court found that the agent should have disclosed that the purchaser was a trader and property investor, and that the agent had been involved with the purchaser on a number of other speculative transactions.

The agent was ordered to pay half of the under-value at which the property was sold, and also ordered to repay the commission received on the sale. This is an example of a misrepresentation by silence.

If found guilty of an offence under Section 9 - there is no limit to fines awarded for breach of Sections 9. Section 40 (which limits fines) excludes Section 9.

In a real estate agency relationship, the client is not usually considered to be in trade [although property developers would be considered to be 'in trade'].

This means that if a customer thinks they have been misled or deceived by a licensee during the purchase/lease process, or the contract was misleading or deceptive, it is the licensee and not usually the client that the customer may look to for compensation under the Fair-Trading Act 1986.

- Under the Fair-Trading Act 1986 property **sellers** in New Zealand are normally **exempt from liability to buyers**, even when that liability results from actions of an agent acting under the specific instructions of the seller. In these situations, **the agent, or licensee acting for and on behalf of the agent, are now normally the only parties to carry liability.**
- Misleading or deceiving conduct can be not only **what you do or say**, but also **what you do not do or say** [not properly disclosing information]. This includes advertising and marketing information.
- Section 9 has been used to bring claims against real estate agents who have misled or deceived purchasers **about the condition / status of the property** or **some aspect of the agreement for sale and purchase / lease**, even when the agent said they 'did not know' the information was incorrect.

The Fair-Trading Act 1986 – Section 14

Section 14 of the Fair-Trading Act (which relates specifically to land) is in two parts. The first part Section 14 [1] prohibits persons making a false or misleading representation in relation to land - property you are selling or leasing.

Under section 14, a false representation occurs when a party in trade represents that a fact is true when it is not. False representations can be intentional (on purpose) or unintentional (without intending to mislead).

Fair-Trading Act 1986

14 False representations and other misleading conduct in relation to land

- (1) **No person shall, in trade, in connection with the sale or grant or possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land, —**
 - (a) **make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or**
 - (b) **make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put, or the existence or availability of facilities associated with the land.**
- (2) **No person shall use physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land.**
- (3) **In this section interest, in relation to land, means a legal or equitable estate or interest in the land and includes—**
 - (a) **a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in a company that owns the land or building; or**
 - (b) **a right, power, or privilege, over, or in connection with, the land.**

Section 14 of the Fair-Trading Act covers false representations and other misleading conduct specifically in relation to land.

It is another particularly important section of the Fair-Trading Act that affects the real estate industry. All real estate licensees have to meet its requirements.

Criminal liability

Note: Under the section 37 of the Real Estate Agents Act 2008, a real estate licensee with a conviction under Section 14 of the Fair-Trading Act is prohibited from holding a real estate licence for five years. Section 40 of the Fair-Trading Act also has penalties.

The Fair-Trading Act 1986 –

Section 14 of the Fair-Trading Act (which relates specifically to land) is in two parts. The first part prohibits persons making a false or misleading representation concerning the:

- **nature of the interest in the land**
- **price payable for the land**
- **location of the land**
- **characteristics of the land**
- **use to which the land is capable of being put or may lawfully be put; or**
- **existence or availability of facilities associated with the land.**

Interest in relation to land means a legal or equitable estate or interest in the land, so it includes a right of occupancy of the land or any right, power, or privilege over, or in connection with, the land.

NOTE:

Land includes:

- the **land itself**
- its **buildings**
- any **legal interest** associated with the land (see section 14(3)).
- any **equitable interest** associated with the land (see section 14(3)).

No person shall, in trade, in connection with the sale or grant or possible sale or grant of an interest in land or with the **promotion by any means** of the sale or grant of an interest in land, - This includes all **communications and activities** that may be carried out in relation to the marketing of the property.

This covers quite a range of activities and communications that can occur such as the following:

- Showing the property to potential buyers (individual viewings and open homes).
- Electronic, hardcopy, and physical marketing materials (advertising, signs, fliers).
- Phone conversations with prospective buyers or sellers
- Face to face conversations with prospective buyers or sellers
- Negotiations with prospective buyers or sellers
- Written correspondence, including emails.
- Information passed on to colleagues.
- 'Walk-in' customers at the office
- Social functions (seminars, other promotional events)
- Other activities that involve or influence the promotion of the property.

Under the Fair-Trading Act, there is **no requirement** for a party to have **acted** on incorrect information given to them for them to bring a claim. Even if the party does not act on the incorrect information, the licensee could still be found to have breached the Fair-Trading Act.

Section 14A and Subpart 4 - Auctions also have relevance to the real estate in relation to auction sales.

Section 14(1)(a)

Section 14(1)(a) states that no false or misleading representations can be made in relation to the following:

That a person has any sponsorship, approval, endorsement, or affiliation.

An example would be telling customers that a famous investor has identified a location as being ideal for property investment, when the investor simply commented that the location was an attractive area to take a holiday.

Section 14(1)(b)

Section 14(1)(b) states that no false or misleading representations can be made in relation to any of the following:

The nature of the interest of the land

For example, a licensee gives a potential customer inaccurate information about the title and ownership rights of a property they are marketing.

The price payable for the land

For example, a licensee advertises a property at a price lower than what has been agreed with a client seller/lessor, or a licensee tries to create interest in a property going to auction by misleading potential buyers about the likely price range.

The location of the land

For example, a licensee advertises a property as being in a highly desirable suburb when really it is in a neighbouring and less desirable suburb.

Another example is the licensee using a photograph which indicates the property has wide ocean views, when really the only part of the property with a view of the sea is where the driveway meets the street.

The characteristics of the land (which includes the dwelling)

For example, a licensee is marketing a residential property and gives a potential customer incorrect information that there were no subdivision plans in the area that could result in more intensive housing. Subdivision consent had already been granted to a neighbouring property that meant, when building was complete, there would be four additional dwellings in the same area of land, resulting in significant intensification. Incorrect information on the age, size, materials used or quality of the property (e.g., 'architecturally designed').

The use to which the land is capable of being put or may lawfully be put.

For example, a licensee is marketing a property and a potential buyer wants to buy the property with the intention of establishing a commercial cattery, or that the property is suitable as a 'home and income'. The licensee tells the buyer they will have no problems doing what they want to do, but later, authority consent is refused.

The existence or availability of facilities associated with the land.

For example, a licensee marketing a property gives incorrect information to a prospective customer about facilities, or the state of facilities, on the property. This includes stating that the property is on town supply water or sewage when in fact it is tank only.

Section 14(2) states

“No person shall use physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land”.

Real Estate work can be very stressful and the threshold for harassment is reasonably high, so as the professional in the transaction, your conduct must be genuine and sincere; allowing the customer to make their decision based on all the facts, and without any pressure from you.

It must be their ‘own’ their decision.

Penalties under the Fair-Trading Act 1986

For penalties to be applied under section 43, the party must show that they have suffered or were likely to suffer damage.

Fair Trading Act 1986

Section 43A Application for order under section 43A

A person may apply to a court or the Disputes Tribunal for an order under [section 43](#) at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

NOTE:

Care should also be taken when describing the location of land in relation to its proximity to shops and other facilities. The courts have held that statements about a house being close to man-made features such as churches, schools and other community services may be misleading under **Section 14** in relation to the location of the land.

Licensees found in breach of the first part of **Section 14** may be criminally liable under the Fair-Trading Act. The second part of **Section 14** will result only in possible civil liability. Other sections of the Act relating to misleading conduct or false and misleading representations may apply also to property managers, agents, or salespersons.

To be liable under the Fair-Trading Act, there is no need for any person to have been influenced by the misleading representation in question. It is enough that the misrepresentation was made.

Representations can be made by words, conduct, or even by silence.

In considering whether a statement or representation is misleading, the court will ask whether the average New Zealand prospective house purchaser or vendor would find the statement misleading.

For example, an advertisement in which a house was described as ‘not a cent to spend’ was found to be misleading, as the average New Zealand prospective house purchaser would have taken it to literally mean that although the house was about 25 years old, the property would not require anything significant to be spent on it in the immediate future.

This was not the case, so the statement was held to be misleading.

Further research: Use the internet to research the following New Zealand case relating to an initial conviction under section 14 of the Fair-Trading Act by a real estate licensee.

[Commerce Commission versus Whitehead.](#)

Fair Trading Act 1986 and Unsubstantiated representations

Section 12A deals with unsubstantiated representations. It is another particularly important section of the Fair-Trading Act that affects the real estate industry. All real estate licensees must meet its requirements.

'Unsubstantiated' means without facts or without evidence to prove (something).

'Representations' means statements, descriptions, portrayals that are given.

Licensees cannot make representations about a property or business without having **reasonable grounds** for those representations at the time they are made. This is the case regardless of whether those representations are **true or false**.

This means that licensees must take **sufficient care** to check or verify whether information is true and accurate before giving out or advertising that information.

Section 12A deals with representations **that a reasonable person would expect to be substantiated and take seriously**.

Fair Trading Act 1986

12A Unsubstantiated representations

- (1) A person must not, in trade, make an unsubstantiated representation.
- (2) A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.
- (3) This section does not apply to a representation that a reasonable person would not expect to be substantiated.
- (4) In this section and [sections 12B to 12D](#), representation means a representation that is made—
 - (a) in respect of goods, services, or an interest in land; and
 - (b) in connection with—
 - (i) the supply or possible supply of the goods or services; or
 - (ii) the sale or grant or possible sale or grant of the interest in land; or
 - (iii) the promotion by any means of the supply or use of the goods or services or the sale or grant of the interest in land.

For example, if a residential property is advertised as 'Home and Income', it could be reasonably expected by potential buyers that the property can legally be used for those purposes (to live in one area and rent out another area). The prospective customers could reasonably expect that the property would have no legal impediment to being a legal 'home and income'.

Note: Under the Real Estate Agents Act 2008, a real estate licensee with a conviction under Section 12A of the Fair-Trading Act is prohibited from holding a real estate licence for five years.

Further research: Use the internet to read the REA information sheet on Unsubstantiated representations.

[Unsubstantiated-representaion.pdf \(rea.govt.nz\)](#)

The Fair-Trading Act 1986 – Price Indications

Licensees need to take care when scripting marketing and advertising material to ensure the statements cannot be construed as being misleading in any way.

Another area that requires care is in regard to giving price indications or price ranges for properties. In a case decided in the High Court in 2006, the Judge considered that an advertisement with the statement 'BEO (Buyer's Enquiries Over) \$380,000' represented that an offer over \$380,000 had a prospect of being accepted and had to be given serious consideration. The Judge said it would not be legitimate to have a '**BEO**' priced less than the vendor's 'bottom line' price and houses should not be advertised at a lower price than realistically would be accepted.

Rule 10.9 of the Code of Conduct specifically instructs that **a licensee must not advertise any land or business on terms that are different from those authorised by the client.**

Rule 9.4 of the Code of Conduct confirms that licensees must avoid under quoting a client's price expectations to a potential customer with the aim of securing an offer. Licensees must avoid offering or advertising a confusing price range or minimum price different to the client's expectations

Rule 9.4 A licensee must not mislead customers as to the price expectations of the client.

Rule 10.4 of the Code of Conduct addresses the risk of a licensee misquoting the clients price expectations to a potential customer to secure an offer.

Rule 10.4 An advertised price must clearly reflect the pricing expectations agreed with the client.

Section 12A applies to all ways of giving information, including verbal information, written information and all marketing and advertising.

Important points relating to section 12A.

- Rely on factual and credible sources of information only. Do not rely on your own assumptions or unsupported information from a seller.
- Keep a record of documentation you have gathered and other information you have enquired about in relation to a property you are marketing.
- You must have reasonable grounds for claims you make at the time they are made.
- Only being able to validate a claim after it was made is not a defence under section 12A.
- Make sure that any statements you make (whether verbally or in advertising) are genuine, accurate and can be substantiated.
- It is important to be incredibly careful if using puffery statements. The 'puffery' exception cannot always be relied on, and it is often safer to avoid using puffery statements altogether.

Note:

Puffery statements are not covered by Section 12A.

Puffery statements are obviously exaggerated statements that no one can reasonably claim to believe. The level of exaggeration means it is clear that the claim should not be accepted as fact. For example, a puffery statement that is sometimes used in real estate advertising could be '*This home is the bargain of the century!*'.

Further research: Use the internet to research the following New Zealand case relating to puffery.

[Real estate agent's marketing 'puffery', not misleading - NZ Herald](#)

The Fair-Trading Act 1986 - Unfair practices

Part 1, sections 17-26, of the Fair-Trading Act cover unfair practices.

Section 17 Offering gifts and prizes or other free item is particularly relevant for real estate licensees. It is a breach of Section 17 for any party in trade to offer gifts, prizes, or other free items with no intention of providing them.

Fair Trading Act 1986

Unfair practices

17 Offering gifts and prizes

No person shall, —

- (a) in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services; or
- (b) in connection with the sale or grant or the possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land, —
- (c) offer gifts, prizes, or other free items with the intention of not providing them or of not providing them as offered.

Real Estate examples include:

- if you offer an incentive gift to everyone who lists with you within a given time period, you must give that gift to each of those people.
- If you were running a competition at an open Home about the price a property may sell for, you must give that gift to each of those people. Participants could be other Licensees, Clients, or customers.

Note:

Every person who contravenes a provision of Sections 17 commits an offence and is liable on conviction, —

- (a) in the case of an individual, to a fine not exceeding \$200,000; and
- (b) in the case of a body corporate, to a fine not exceeding \$600,000.

Under the Real Estate Agents Act 2008, a real estate licensee with a conviction under Section 17 of the Fair-Trading Act is prohibited from holding a real estate licence for five years.

Fines are payable to the Crown and do not limit the court's ability to order compensatory damages or make other orders.

The Fair-Trading Act 1986 - Unfair terms

The Fair-Trading Act confirms that clauses that conflict with the interests of the consumer cannot be used in agency agreements and other contractual documents.

Section 26A

Section 26A, prohibits a business from including a contractual term in a standard form contract or from applying, enforcing, or relying on the term if a court decides that it is unfair.

Section 46L

Section 46L defines when a contract term is unfair.

Fair Trading Act 1986

Declaration of unfair contract terms

46L When term in consumer contract is unfair.

- (1) A term in a consumer contract is unfair if the court is satisfied that the term—
- (a) would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.

A real estate industry example

A roll-over clause is an example of an unfair contract term in an agency agreement. A roll-over clause used to be commonly used to turn a sole agency into a general agency automatically after the sole agency lapsed.

Inclusion of a roll-over clause meant that clients had to officially cancel the general agency agreement (that had started automatically) if they did not want to work with that agency anymore.

Note:

Under rule 9.12 of the Code of Conduct, an agent must not use an agency agreement to impose conditions on a client if those conditions are not reasonably necessary to protect the agent's interests. Use of a clause such as a roll-over clause would also breach rule 9.12.

The Fair-Trading Act 1986 – Uninvited direct sales

Subpart 2 Uninvited direct sales (sections 36K to 36S) offer protection to consumers who are approached by uninvited salespeople at their home or workplace or by telephone. These can include telemarketers and people door knocking to offer deals for power, insulation, phone connections etc.

These protections also require the licensee to give additional information to a client who was approached through an uninvited direct sale before they sign the agency agreement, and in the agency agreement itself.

They extend the statutory timeframe provided under the Real Estate Act for cancelling a sole agency agreement after it has been signed (section 130, REAA 2008).

Sections 36K to 36S

The Fair-Trading Act 1986

36K Meaning of uninvited direct sale agreement.

1. In this subpart, **uninvited direct sale agreement** means an agreement for the supply, in trade, of goods or services to a consumer—
 - (a) that is made as a result of negotiations (whether or not they are the only negotiations that precede the making of the agreement) between a supplier and the consumer in a situation described in either subsection (2) or (3); and
 - (b) **where the price paid or payable by the consumer under the agreement—**
 - I. is more than \$100; or
 - II. cannot be ascertained at the time of supply (regardless of whether the price ultimately paid or payable is \$100 or less).
- (2) The first situation is where the negotiations take place between the consumer and the supplier, in each other's presence, in the consumer's home or workplace, where the consumer did not invite the supplier to come to that place for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply).
- (3) The other situation is where the negotiations take place by telephone, where the consumer did not invite the supplier to make the telephone call for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply).
- (4) However, **uninvited direct sale agreement** does not include a renewal agreement.
- (5) For the purposes of this section, a consumer has not invited a supplier to—
 - (a) come to the home or workplace, or to make a telephone call, merely because the consumer has—
 - (i) given his or her name or contact details to the supplier other than for the predominant purpose of entering into negotiations relating to the supply of goods or services; or
 - (ii) contacted the supplier in connection with an unsuccessful attempt by the supplier to contact the consumer:
 - (b) enter into negotiations for a supply merely because the supplier has provided an unsolicited quote or estimate

An uninvited direct sale is when:

- You approach a consumer uninvited at their home, workplace, or over the telephone, to try and sell goods or services.
- and
- an agreement is entered into for goods or services costing \$100 or more (or a price that is uncertain at the time of supply).

This can be done through a variety of methods like collecting a person's contact details through competition entries or Open Home registers. Other ways include flyer drops, business cards, phone calls, door knocking and offering free appraisals.

Section 36S is about the regulations and you can research them following this link and the search for Section 36S.

<http://www.legislation.govt.nz/act/public/1986/0121/61.0/DLM96439.html>

Important points for real estate agencies/licensees

Under sections 36K to 36S, important points for real estate agencies and licensees are as follows:

- Agency agreements count as uninvited direct sales if they are the result of unsolicited telemarketing or door-to-door sales approaches.
- In usual circumstances, a client can cancel a signed sole agency agreement so long as they provide written notification of the cancellation by 5pm on the **first** working day after they receive a signed copy of the agreement (section 130 REAA 2008). This is known as the cooling-off period.
- However, if uninvited direct sales lead to a client signing an agency agreement, the client is entitled to cancel the agreement up to **five** working days after the date they are supplied with a signed copy of the agreement.
- Before the agreement is signed, the licensee must provide **oral notification** to the client that they are entitled to cancel the agreement within five working days after the date they are supplied with a signed copy. This notification must include telling the client how to go about cancelling the agreement.
- The licensee must also ensure the front page of the agency agreement states that the client is entitled to cancel the agreement within five working days.
- Real estate agencies must have policies and procedures in place to manage sales that result from uninvited direct sales approaches. This documentation must be designed to make sure agencies and their licensees comply with the requirements for the disclosure and use of extended cooling off periods. Licensees are responsible for following these policies and procedures.

NOTE:

If a consumer initiates the contact with the business or its agent, this does not count as an uninvited direct sale.

A renewal agreement does not count as an uninvited direct sale agreement either.

Marketing via electronic messaging is not covered by this legislation. It is covered under the Unsolicited Electronic Messages Act 2007.

Penalties for breach of the Fair-Trading Act

The penalties for breaching the Fair-Trading Act are set out in Section 40.

Fair-Trading Act 1986

Offences

40 Contraventions of provisions of Parts 1 to 4A an offence

- (1) Every person who contravenes a provision of Part 1 (except sections 9, 14(2), 23, or 24), Part 3, or Part 4 commits an offence and is liable on conviction, —
 - (a) in the case of an individual, to a fine not exceeding \$200,000; and
 - (b) in the case of a body corporate, to a fine not exceeding \$600,000.
- (1A) Every person who contravenes section 24 commits an offence and is liable on conviction to a fine not exceeding \$600,000.
- (1B) Every person who contravenes a provision of Part 2 or Part 4A commits an offence and is liable on conviction, —
 - (a) in the case of an individual, to a fine not exceeding \$10,000; and
 - (b) in the case of a body corporate, to a fine not exceeding \$30,000.
- (2) Where a person is convicted, whether in the same or separate proceedings, of 2 or more offences in respect of contraventions of the same provisions of this Act and those contraventions are of the same or a substantially similar nature and occurred at or about the same time, the aggregate amount of any fines imposed on that person in respect of those convictions shall not exceed the amount of the maximum fine that may be imposed in respect of a conviction for a single offence.

In Summary:

Section 40 (which limits fines) excludes Section 9 and Section 14(2).

If someone is found guilty of breaching Section 9 and Section 14(2)- there are no limits to the fines that can be awarded.

Section 9 relates to misleading and deceptive conduct generally and Section 14(2) covers physical force, harassment, and coercion in relation to land.

Note:

Fines are payable to the Crown and do not limit the court's ability to order compensatory damages or make other orders.

Information from the Commerce Commission about penalties under the Fair-Trading Act

This section provides a summary of information provided by the Commerce Commission about the implications of section 40 of the Fair-Trading Act.

This includes penalties, infringement offences and banning orders, all of which may apply to real estate licensees who breach the Act.

- Only the courts can make a ruling on breaches of the Fair-Trading Act.
- Individuals can be fined up to \$200,000 per offence for
- unsubstantiated representations, for false representations and other misleading conduct (2018c).
- Companies can be fined up to \$600,000 per offence for unsubstantiated representations, false representations and/or other misleading conduct (2018c).
- A district court may issue a management banning order against anyone convicted of these offences on two or more separate occasions within a ten-year period (2018c). [Note that a banning order prevents the person from being involved in the management of a company.]
- A breach of the uninvited direct sales provisions of the Fair-Trading Act can mean a fine of \$10,000 for an individual and \$30,000 for a company. A breach of the information disclosure requirements for uninvited direct sales can also result in an infringement notice and a fine of \$1,000 (2018a).

In relation to unfair contract terms in standard form consumer contracts, the Commerce Commission can apply to the court to obtain a declaration that a term in a standard form consumer contract is unfair.

If the party continues attempting to use or enforce this term, the court may fine them up to \$200,000 per breach (if it is an individual) or \$600,000 per breach (if it is a company). An order to pay damages or refund money could also apply (2018b).

The Commerce Commission identifies other remedies that are available under the Fair-Trading Act in its document *Enforcement response guidelines* (2013). These remedies can be applied in addition to the fines shown above and apply to situations such as misleading and deceptive conduct.

Examples of remedies include:

- Orders that require information to be disclosed or advertisements to be published.
- Compensation/refund orders that require a party to provide a refund or compensation, or to return property.
- Orders that require contracts to be varied or that declare them to have no effect (so that the contract is void).

For more information on the obligations of real estate agents under the Fair-Trading Act, visit <https://comcom.govt.nz/business/your-obligations-as-a-business> .

For information about the investigation processes followed by the Commerce Commission, visit: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/competition-and-consumer-investigation-guidelines>

Information from the Real Estate Authority (REA) about penalties under the Fair-Trading Act
The REA provides the following advice.

- Prohibition from holding a real estate licence.
- Under section 37 of the Real Estates Agents Act, a person who has been convicted of an offence under sections 12A, 14 and 17 of the Fair-Trading Act 1986 is prohibited from holding a real estate licence for 5 years.

Other sections of the Fair-Trading Act that are relevant to real estate.

Note: Convictions under section 22 (Misleading representations about certain business activities), or section 24 (Pyramid selling schemes) which are also 'unfair practices' under the Fair-Trading Act, though not related to real estate, also prohibit individuals from holding a real estate licence for five years under the Real Estate Agents Act 2008.

RISK MANAGEMENT- Protect the client, the customer and yourself.

Information and advice

- Make sure you are knowledgeable about the law, the property you are selling and agency best practice.
- Give verifiable and accurate information to customers when it is available.
- Do not pass on information that you are not sure about. Check the facts.
- If you do not know the answers to vendors' or purchasers' questions, say so.
- Advise customers to seek independent advice themselves, e.g., legal advice, builders reports, surveyors, the local council, registered valuers, engineers.

Disclosure and confidentiality

- Fully disclose defects that you are aware of. *See Rule 10.7*

Documents and advertising

- Make sure that transactional documents comply with legal requirements, and that you carefully explain them to clients and customers before they sign the documents.
- Carefully proofread all advertising and marketing materials to make sure they are accurate.
- Keep good diary notes.
- You and your agency must be aware of your obligations and must implement systems and procedures to make sure you comply with the Fair-Trading Act to avoid breach and liability.
- You need to be able to recognise 'alarm bells' where a situation could expose you to liability. Approach contracts from a 'protection of self' point of view – this means you should not process contractual agreements with clients and customers whom you think could expose you to 'dangerous territory'.
- Make sure you understand your company's risk management plan in relation to liability.
- Check that your agency has adequate professional indemnity insurance to cover claims and associated costs.

The Fair-Trading Act Section 40a – 40H provide information about additional penalties and infringement notices.

<http://www.legislation.govt.nz/act/public/1986/0121/61.0/DLM96439.html>

- 40A Additional penalty for contravention of section 24 involving commercial gain.
- 40B Infringement offence, etc, defined.
- 40C Infringement offence alleged.
- 40D Issue of infringement notice.
- 40E Procedural requirements for infringement notices.
- 40F What Commission does with infringement fees.
- 40G Effect of infringement notice.
- 40H Regulations relating to infringement offences.

The Contract and Commercial Law Act 2017

The Contract and Commercial Law Act 2017 (CCLA) came into force on 1 September 2017 and it replaces the following pieces of legislation into one Act.

- Carriage of Goods Act 1979.
- Contracts (Privity) Act 1982.
- Contractual Mistakes Act 1977.
- Contractual Remedies Act 1979.
- Electronic Transactions Act 2002.
- Frustrated Contracts Act 1944.
- Illegal Contracts Act 1970.
- Mercantile Law Act 1908 (other than Part 5).
- Minors' Contracts Act 1969.
- Sale of Goods Act 1908.
- Sale of Goods (United Nations Convention) Act 1994.

Apart from a few minor changes, the Contract and Commercial Law Act 2017 does not significantly amend the provisions of these Acts.

It does, however, use clearer and more modern language than some of the repealed pieces of legislation, with the intention of making the new legislation easier to understand.

Sections of the Contract and Commercial Law Act 2017 that we will focus on are.

- **Section 24 - Relief may be granted if mistake by one party is known to another party or is common or mutual.**
- **Section 28 – Nature of Relief**
- **Section 35 - Damages for misrepresentation**
- **Section 37- Party may cancel contract if induced to enter into it by misrepresentation or if term is or will be breached.**

Note:

Section 35 was formerly covered by section 6(1) of the Contractual Remedies Act 1979.

Section 37 was formerly covered by section 7(3) of the Contractual Remedies Act 1979.

The Contract and Commercial Law Act 2017

Misleading and deceiving a client or failing to inform or correct an assumption is a breach of the Fair-Trading Act and could result in damages under The Contract and Commercial Law Act 2017.

To protect consumers, breaches of the Fair-Trading Act is covered by the Contract and Commercial Law Act 2017 and it outlines their entitlement to damages for deceit or negligence and situations where a customer wants to make a claim because of a misrepresentation made by a real estate agent acting on behalf of their client.

Misrepresentations made by the agency or licensee on behalf of the client [where the client was not at fault] may result in the agent being required to **indemnify the client** [this means cover the cost of any court decisions made against them].

A misrepresentation is a **false statement**, it could be information spoken or **stated in documentation or advertising** and lead to a claim for damages under The Contract and Commercial Law Act 2017.

The customer is legally entitled to bring action under the Fair-Trading Act and the Contract and Commercial Law Act 2017

Relevant Sections of the Contract and Commercial Law Act as they apply to real estate licensees, clients, and customers

The Contract and Commercial Law Act 2017 covers situations where a customer (buyer) may be entitled to cancel a contract because of a misrepresentation made by a party selling/leasing a property/space/business, or by real estate licensee acting on behalf of their client (vendor).

Section 24 - Outlines the relief that may be granted if a mistake by one party is known to another party or is common or mutual.

Section 28 – Outlines the nature of relief for breaches under Section 24 -26

Section 35(1)(a) of the Contract and Commercial Law Act 2017 allows for damages in the same manner and to the same extent as if the misrepresentation were a term of the contract.

Section 37 of the Contract and Commercial Law Act 2017 covers cancellation of contracts between parties.

Contract and Commercial Law Act 2017 – Section 24

Section 24 - Outlines the relief that may be granted if a mistake by one party is known to another party or is common or mutual.

An example would be if the apartment being purchased off the plans had great views, but the incorrect Lot Number appeared on the S&P Agreement resulting in a different apartment being sold with no views. The vendor may or may not have been aware of the error.

Contract and Commercial Law Act 2017 – Section 28

Section 28 – Outlines the nature of relief for breaches under Section 24 -26

An example would be the Court may declare the contract void or if possible, may correct the mistake or award compensation.

Contract and Commercial Law Act 2017 – Section 35 –

Damages for misrepresentation

Contract and Commercial Law Act 2017

35 Damages for misrepresentation

- (1) If a party to a contract (**A**) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (**B**),
 - (a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and
 - (b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.

Section 35(1)(a) of the Contract and Commercial Law Act 2017 allows for damages in the same manner and to the same extent as if the misrepresentation were a term of the contract. There is, however, no entitlement to damages for deceit or negligence (section 35(1)(b)).

This means that no extra damages will be awarded under this legislation if a customer was induced into the contract or suffered additional pain or loss.

If a misrepresentation is made by the agent or licensee working on behalf of the client but the client was not at fault, the agent may be instructed by the Court to indemnify the client. This means the agent would be required to cover the cost of any court decisions made against the client.

An example would be if a spa pool was promised but not included in the chattels and was not there on settlement day, then the compensation would only be for the cost of the spa pool to be replaced. There would be no allowance for claims of damages for negligence.

Contract and Commercial Law Act 2017 – Section 37 – Cancellation of the Contract

Section 37 of the Contract and Commercial Law Act 2017 covers cancellation of contracts between parties. If misrepresentation under Section 35 is established, the customer may be able to lawfully cancel the sale and purchase/lease agreement under Section 37.

Contract and Commercial Law Act 2017

37 Party may cancel contract if induced to enter into it by misrepresentation or if term is or will be breached.

- (1) A party to a contract may cancel it if—
 - (a) the party has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to the contract; or
 - (b) a term in the contract is breached by another party to the contract; or
 - (c) it is clear that a term in the contract will be breached by another party to the contract.
- (2) If subsection (1)(a), (b), or (c) applies, a party may exercise the right to cancel the contract if, and only if, —
 - (a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the cancelling party; or
 - (b) the effect of the misrepresentation or breach of the contract is, or, in the case of an anticipated breach, will be, —
 - i. substantially to reduce the benefit of the contract to the cancelling party; or
 - ii. substantially to increase the burden of the cancelling party under the contract; or
 - iii. in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.
- (3) Subsection (1) is subject to the rest of this subpart but does not limit section 36.

Under S36 A party may cancel the agreement if the other party has indicated they will not perform their obligations. Under S37 you could only cancel a contract if the mistaken representation were substantial. The spa pool example would not qualify you to cancel.

Legal concepts associated with misrepresentation under the Contract and Commercial Law Act are as follows:

- **Induce** means persuade or influence.
- A **misrepresentation** occurs when a false or incorrect statement is made to another party about a material fact.
- It does not matter under this legislation if misrepresentation is fraudulent (deliberate) or innocent (not deliberate). Parties can still have liability even if they do not know the information is false or incorrect.
- A material fact is information that is significant enough to influence a party to act in a certain way i.e., a customer deciding to enter into a sale and purchase, or lease agreement based on information they are given. A material fact might relate to the physical state of a property/space/business or other issues or events that affect it.

For example, a party interested in buying an operational business would expect to be presented with turnover figures for that business. If the turnover figures appear healthy to them, that may be a material fact that induces them to make an offer for the business. If, in fact, the turnover figures presented to that party are different (higher) than the real turnover for the business, this would be an example of misrepresentation.

By or on behalf of another party to that contract means that a seller/lessor could be found to have made the misrepresentation to the buyer/lessee, or that another party (a real estate agent or licensee) has done so on their behalf.

Avoiding misrepresentation in communications with clients and customers

Misrepresentation could occur in verbal communications, written documentation, and/or in any advertising media used if false or incorrect information is given either deliberately or by mistake.

KEY POINTS to help you avoid misrepresentation in communications with clients and customers:

- Make sure you understand your legal obligations and make sure you give correct and validated information about the property/space/business you are marketing.
- Work under the direction and control of your supervising agent/branch manager. If there is anything you are not sure about, ask!
- Avoid exaggerations about key qualities of a property/space/business being marketed.
- Check and proofread all advertising and marketing materials to make sure they are accurate.
- Do not pass on information that you are not sure about.
- Advise customers to seek independent legal and/or technical advice themselves.

The Code of Conduct

This table highlights the key rules relating to disclosure, avoiding misleading conduct, giving false information, and withholding information that should be disclosed.

Rule		Applies to client	Applies to customer
6.1	A licensee must comply with the fiduciary obligations to the licensee's client	YES	
9.1	A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.	YES	
5.1	A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work	YES	YES
6.2	A licensee must act in good faith and deal fairly with all parties engaged in a transaction	YES	YES
6.3	A licensee must not engage in any conduct likely to bring the industry into disrepute	YES	YES
6.4	A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.	YES	YES
10.7	A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either— (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.	YES	
10.8	A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.	YES	
9.4	A licensee must not mislead customers as to the price expectations of the client	YES	YES
9.16	A licensee must not use information that is confidential to a client for the benefit of any other person or of the licensee.	YES	
9.17	A licensee must not disclose confidential personal information relating to client unless— (a) the client consents in writing; or (b) disclosure is necessary to answer or defend any compliant, claim, allegation, or proceedings against the licensee by the client; or (c) the licensee is required by law to disclose the information; or (d) the disclosure is consistent with the information privacy principles in section 6 of the Privacy Act 1993.	YES	
9.18	Where a licensee discloses information under rule 9.17(b), (c) or (d), it may be only to the appropriate person or entity and only to the extent necessary for the permitted purpose	YES	

The fiduciary relationship with a client

As we have seen, in real estate terminology the client is the party who has an agency agreement with the agent. The client is the principal in the relationship created by the agency agreement and the agent is the fiduciary. The agent therefore has fiduciary obligations to the client.

The client is most often a seller or lessor who is offering a property or business for sale or a space for lease.

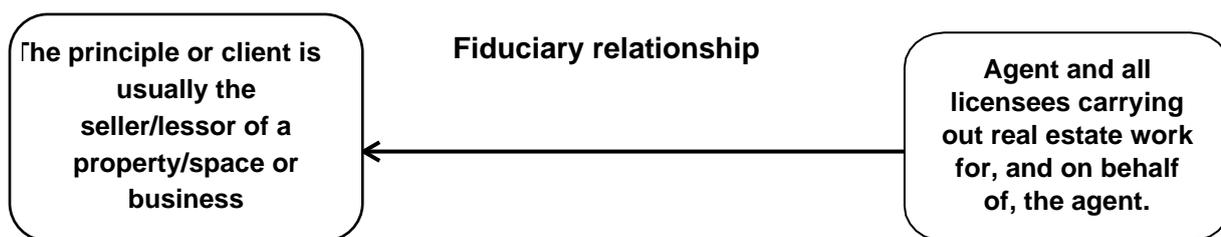
In other cases, a buyer or lessee might ask an agency to work on their behalf to secure a property/space or business. In that case, an agency agreement would be signed between the agency and the buyer/lessee. The buyer/lessee would be the client and the principal in the agency agreement contract.

The basis of a fiduciary relationship is **the duty of loyalty**.

The fiduciary relationship is one of utmost trust between the parties and requires each party to give **full disclosure** to the other. The agent must always act in the best interest of their client.

A **licensee** acting for, and on behalf of, the agent is **bound** by same **fiduciary obligations** as the agent.

A licensee's fiduciary obligation to their client continues until settlement and, in some cases, can continue beyond that.



Fiduciary duty is a common law principle.

Rule 6.1 states that all licensees must comply with fiduciary obligations to clients.

Fiduciary obligations requiring absolute loyalty are owed solely to the agent's client, not to all parties.

Rule 9.1 states that while licensees must act in the best interests of their client and must follow their instructions, this duty does not extend to acting illegally.

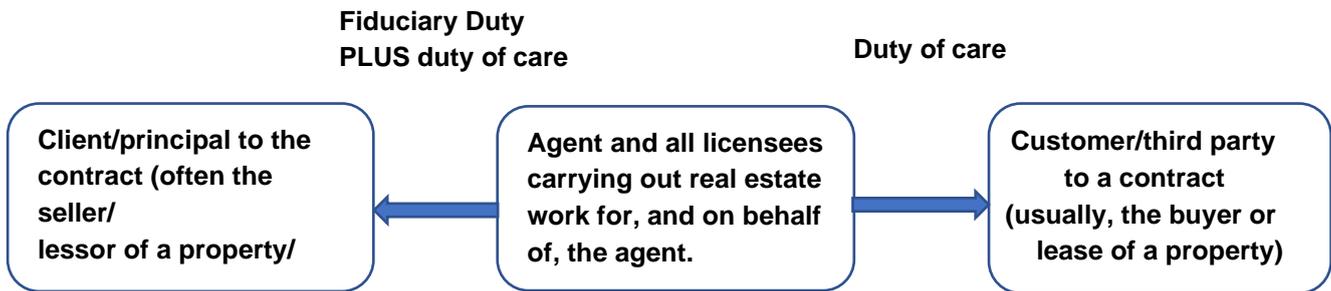
Unlawful instructions must not be followed.

Rule 6.2 states that all licensees must act in good faith and deal fairly with all parties engaged in a transaction.

BUT note the customer sits outside the fiduciary relationship that exists between the agent and the client.

Duty of care

An agent's, and licensee's, foremost obligations are to the client. However, agents and licensees also have **duty of care** to customers. There is an obligation to **deal fairly** and **in good faith** with **customers**.



Rule 6.2 states that licensees must act in good faith and deal fairly with all parties involved in a transaction.

Dealing fairly with customers includes the following:

- Full disclosure of all material facts to the customer. This does not include the client's confidential personal information (unless permitted in writing).
- A licensee must not mislead a prospective customer, by doing (or not doing) something, or saying (or not saying) something, even if it would benefit their client.

A licensee's disclosure obligation to a customer continues until settlement.

- Rules 5.1 and 6.3 are general provisions that set out basic standards of professional competence and behaviour acceptable in the industry.

Rules 6.4 and 10.7 reflect the principles of consumer protection law.

Rules 6.4 and 10.7 are two important rules that outline a Licensees obligations in relation to disclosure of defects and principles of section 9, section 12A and section 14(1) of the Fair-Trading Act and section 35(1) of the Contract and Commercial Law Act.

Rule 6.4 requires that a licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

Rule 10.7 requires the disclosure of **known** defects to a customer.

Licensee obligations in relation to disclosure of hidden or underlying defects

Rule 10.7 also makes it clear that where it would appear likely to a reasonably competent licensee that **land may be subject to hidden or underlying defects**, a licensee must either:

- obtain **confirmation from the client**, supported by **evidence or expert advice**, that the land in question is not subject to defect; or
- ensure that a **customer is informed** of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

Hidden or underlying defects are not defined in the Code of Conduct, but an example scenario of a hidden or underlying defect that is used in the Code of Conduct is a defect relating to weathertightness.

Disclosure

The following footnote about weathertightness is provided in the Code of Conduct under rule 10.7:

For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weathertightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 10.7

Many issues could be considered a defect under 10.7. These could include, for example, unpermitted works, and/or other issues that would impact on the property, such as proposed developments or methamphetamine contamination.

It is important to note that rule 10.7 **does not** limit the range of issues to be considered under rule 10.7 to weathertightness only.

Where it would appear likely to a reasonably competent licensee is another important term from rule 10.7.

Likely refers to a 'more likely than not' significant potential risk.

A **reasonably competent licensee** can be understood to mean a licensee who has obtained an appropriate qualification, is currently licensed, and has a level of knowledge and professional practice that reflects that.

Obligation to cease acting for a client who will not allow disclosure under rule 10.7.

Under rule 10.8, licensees must make sure that seller/lessor clients understand the licensee's disclosure obligations to buyer/lessee customers under rule 10.7.

Seller/lessor clients must be told that the licensee can **no longer act** for clients who direct that such information not be given to buyer/lessee customers. In other words, the licensee must cancel the agency agreement.

Consent of client seller/lessor to disclose.

It is crucial for licensees to talk with the client seller/lessor first before disclosing information about a property/space/business being marketed.

Disclosure cannot be made without the client's **informed consent**. Informed consent means they understand what they are consenting to and the implications of the disclosure.

It is best practice for licensees to obtain written confirmation from the client that they have given informed consent to disclose property related information.

We have seen that a licensee's fiduciary obligation to their client (rule 6.1) is a primary duty, and that the licensee must act in accordance with the lawful instructions of their client (rule 9.1).

We have also seen that if a licensee believes that disclosure about issues with the property should be made, but the client does not agree, then the licensee must stop acting for the client (rule 10.8) and not disclose the information.

When a licensee stops acting for a client in these circumstances, under the continuing fiduciary obligation, the licensee may not disclose the reason for ending the agency relationship.

Additional disclosure requirements for licensees in relation to weathertightness issues

It is important to note that Disciplinary Tribunal decisions such as *B v CAC & M [2011] NZREADT 19* have made it clear that if a licensee is aware that a property is of a type that is prone to weathertightness issues, they cannot simply rely on the fact that the buyer obtained their own building report and remain silent.

The Tribunal decision in *B v CAC & M [2011] NZREADT 19* confirmed that licensees need to go further and point the weathertightness concern out to the seller (and obtain confirmation supported by evidence or expert advice that the property is weathertight); or raise the issue with the buyer.

Example situations include the following:

- A previous sale of the property has fallen through as a result of information given in a building report.
- The licensee knows that the property is designed or constructed of materials which make it likely that it is affected by weathertightness issues.
- The property is in a complex where the licensees know other properties have been affected by weathertightness issues.
- The licensee suspects, based on experience, that the property may have weathertightness issues.

In another case, *Munley v REAA & Ors [2016] NZREADT 53*, the Disciplinary Tribunal confirmed that licensees are expected to be able to identify properties that may have issues related to cladding (and therefore potential issues relating to weathertightness).

The Disciplinary Tribunal said that to comply with Rule 10.7(b), it is 'not sufficient to rely on a seller's statement that there are no issues or to just recommend [to the buyer] a building report be obtained'.

The Disciplinary Tribunal said the licensee must also 'at the very least point out the nature of the cladding to a potential buyer and strongly suggest that the potential buyer obtain a comprehensive building report [after discussions with the seller].

Rule 10.8 would apply if the seller refused disclosure. The full case can be found at: <https://www.justice.govt.nz/assets/Documents/Decisions/2016-NZREADT-53-Munley.pdf>

All disclosure must be confirmed in writing.

Under the direction and control of your supervising agent/branch manager, any identified issues must be fully disclosed, and customers must be advised to seek independent legal/technical advice before proceeding to enter into a transaction (before making a written offer).

Verbal disclosure to customers must be confirmed in writing, for example, by email.

An **as is/where is** provision does not cancel disclosure obligations. It means that a seller is selling a property in the condition it is currently in (including all existing faults) at the time the sale and purchase agreement is signed. By signing a contract with this provision, the buyer accepts the existing condition and faults.

Examples of where '**as is/where is**' provisions apply include problems with a property's zoning; title issues; mortgagee sales; the need for significant repairs or decontamination of a building; compliance issues (such as an unpermitted extension or fireplace); boundary issues; or the illegal presence of occupants on a property.

If an as is/where is provision is being used, the standard seller warranties should be crossed out or removed from the sale and purchase agreement.

Under rules 6.4 and 10.7, the licensee's disclosure obligations are not changed or cancelled by the use of an as is/where is provision.

The licensee must fully disclose any information they are aware of (or should be aware of) that may influence the prospective buyer's decision to buy the property. This information must be disclosed by or before the point of inducement.

If a property is being sold on an as is/where is basis, the licensee should urge anyone interested in purchasing the property to seek independent legal and technical advice.

Licensees should always seek the guidance of their agent or branch manager licensee in situations such as this.

Licensees must be careful when describing land.

Licensees found in breach of the first part of **Section 14** may be criminally liable under the Fair-Trading Act. The second part of **Section 14** will result only in possible civil liability. Other sections of the Act relating to misleading conduct or false and misleading representations may apply also to property managers, agents, or salespersons.

Licensees must not be misleading in terms of price expectations.

Rule 9.4 states that licensees must not mislead customers as to the price expectations of the client.

The rule confirms that an advertised price must be a price that would be given serious consideration by a client seller/lessor. This applies to all communications – verbal, written and in advertising material. Effective communication with the client in relation to pricing is crucial.

Rule 9.4 seeks to prevent the following:

- A property/space/business being advertised for lower than as agreed with a client seller/lessor, as this is misleading to customers.
- Licensees deliberately underquoting a client's expectations in an attempt to secure a quick transaction.

Confidential client information

Non-disclosure of confidential personal client information unless written consent is obtained.

Rules 9.16, 9.17 and 9.18 cover non-disclosure of confidential client information and the limited circumstances in which this type of information could be disclosed.

Rule 9.16 recognises that through licensee dealings with the client, confidential information about that client may come to light.

For example, through discussions, it may become clear that a seller is desperate to sell their property quickly because of financial difficulties, because of a relationship breakdown, or a need to relocate for career reasons.

Rule 9.16 states that such confidential information must not be used for the benefit of the licensee or any other person.

Rule 9.17(a) states that only if the client consents in writing, can this kind of confidential information be disclosed.

In some cases, a client may wish certain confidential personal information to be made public to assist a quick sale. For example, 'Buyer moving overseas. Needs to sell!'

However, this must never be assumed. It must be discussed with the client and their **written consent** be obtained before referring in any way to their confidential personal information.

A licensee's duty of confidentiality to their client continues indefinitely.

Disclosure of confidential client information in other circumstances

Rules 9.17(b) and 9.17(c) acknowledge that there may be legal circumstances in which confidential personal information about the client may need to be disclosed.

These being as follows:

- For the licensee to defend a complaint, claim, allegation, or proceedings brought by the client against the licensee.
- If the licensee is required by law to disclose the information.

Rule 9.17(d) states that any such disclosure must be in accordance with section 6 of the Privacy Act 1993.

These privacy principles can be found at:

<http://www.legislation.govt.nz/act/public/1993/0028/latest/DLM297038.html>

Rule 9.18 states that if confidential personal information about a client is disclosed under rules 9.17(b), 9.17(c) or 9.17(d), it may only be to the appropriate person, to the extent necessary, for the permitted purpose.

Case Study - Some examples of misrepresentation

The principles of the law and misrepresentation apply whether you are working in a residential, commercial, business broking or rural real estate role.

Residential - Lawton vs Norcross, 2000 - A real estate licensee misrepresented the size of a house to a purchaser as 4500 sq. ft. when, in actual fact, it was 3552 sq. ft.

Rural - Clemance v Hollis, 1987 - The purchaser of a kiwifruit orchard relied on a representation by a real estate licensee as to the potential production capacity of the land. The salesperson's prediction was well in excess of the orchard's capacity.

Commercial - Modelled scenario - A purchaser proceeded to buy two industrial units based on a representation made to her by an agent that the units were returning 10.4% and 9.5% annually. In fact, the net rent for both units was approximately 5.2%.

Misrepresentation occurred because the real estate salespersons made 'false or incorrect statements' to purchasers about 'material facts' which persuaded / influenced the purchasers to make their decisions.

*The information given were facts that **a reasonable person would be expected to rely on when making their decision**, e.g., house size in the residential case, production capacity of the land in the rural case, and net rents in the commercial example.*

***It did not matter whether the misrepresentation was 'innocent' or 'fraudulent'**. Parties can still be liable even if they do not know the information is false or incorrect.*

Other references

<https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/competition-and-consumer-investigation-guidelines>